



Employment law update

Social media cases

5th February 2021



- Can I discipline an employee for working elsewhere when they are absent owing to long term sickness?
- Can I dismiss an employee for posting videos of horseplay in company uniform on YouTube?
- Can I dismiss an employee for sending pornographic emails five years' ago?
- Can I sack an employee for making sexist comments on their Facebook page?
- What action can I take against someone whose photos on Instagram are inappropriate?
- Can an employee complain to the press about their treatment at work, without raising a grievance first?



Can I discipline an employee for working elsewhere when they are absent owing to long term sickness?



- *Gill v SAS Ground Services UK Limited ET/2705021/09*
- Ms Gill was employed as a customer service representative for SAS Ground Services
- She was placed on sick leave with full pay owing to impending surgery
- A colleague forwarded Ms Gill's Facebook post to managers, which showed her attending London Fashion Week while she was on paid sick leave
- The employer conducted a disciplinary investigation, during which Ms Gill claimed that her attendance at the fashion show was merely for social purposes
- However, the Facebook post referred to her 'auditioning 300 models' and choreographing a fashion show. A YouTube video also showed Ms Gill presenting a bouquet of flowers to a fashion show designer



Can I discipline an employee for working elsewhere when they are absent owing to long term sickness? (2)



- The employer concluded that Ms Gill had been conducting other work while signed off sick, and decided to dismiss her for gross misconduct
- The employer also took into account the demoralising effect that Ms Gill's actions had on her colleagues
- Ms Gill claimed unfair dismissal
- The employment tribunal held that Ms Gill had been fairly dismissed
- The employer had followed a fair procedure, and the social media evidence was sufficient to entitle the employer to reach the conclusions it did about Ms Gill's conduct
- Although this claim did not succeed, it is important to consider the individual facts of each case



Can I dismiss an employee for posting videos of horseplay in company uniform on YouTube?



- *Taylor v Somerfield Stores Ltd ETS/107487/07*
- Mr Taylor posted a 20-second video on YouTube of another employee in uniform being bashed over the head with a plastic bag full of other plastic bags in a storeroom
- One participant was wearing the Somerfield uniform, which was recognisable only by its colour pattern
- The video footage had been recorded by another colleague around a year earlier. Mr Taylor uploaded the video to YouTube during a social evening with colleagues. The video received eight hits and Mr Taylor took it down, unprompted, after three days
- A couple of weeks before the incident, the employer had featured in a Sunday newspaper article owing to a number of other online videos showing employees misbehaving
- The employer had sent a memo to store managers emphasising the importance of preventing such videos, but the employee had not been made aware of this.



Can I dismiss an employee for posting videos of horseplay in company uniform on YouTube? (2)



- The employee was summarily dismissed for gross misconduct in 'posting inappropriate film footage ... which brought the company into disrepute'.
- Mr Taylor claimed unfair dismissal
- The Employment Tribunal held that the dismissal was unfair
- There was no evidence from which the employer could have formed any belief that the video had damaged its reputation. The dismissing manager had not even watched the video, did not find out how many hits it had received and the employer's name or logo had not been visible
- The employer had also failed to consider alternatives to dismissal, or taken into account any mitigating factors
- The tribunal reduced the basic and compensatory awards by 30% for contributory fault, commenting that the employee was blameworthy to a 'moderate' degree



Can I dismiss an employee for sending pornographic e-mails five years' ago?



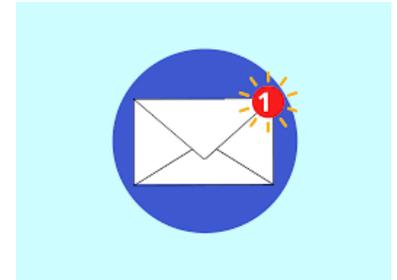
- *Williams v Leeds United Football Club [2015] EWHC 376*
- Mr Williams was employed as a Technical Director at Leeds United Football Club
- He forwarded an e-mail via his work address to a junior female colleague and to two friends who worked at other clubs
- The e-mail contained a spoof PowerPoint presentation that included a series of obscene pornographic images and a message that said 'Looks like dirty Leeds!!'
- The employer did not discover this until over five years later, on a 'fishing expedition' to find a way to avoid paying Mr Williams his notice pay after giving him notice of redundancy
- The employer had a policy forbidding use of the e-mail system to send, among other things, obscene images, although Mr Williams had never been given a copy of the policy



Can I dismiss an employee for sending pornographic emails five years' ago? (2)



- The employer summarily dismissed Mr Williams for gross misconduct
- Mr Williams unsuccessfully appealed against his dismissal and instigated proceedings against the club claiming damages for wrongful dismissal
- The High Court held that summary dismissal was lawful. Mr Williams' actions in forwarding the e-mail amounted to a breach of the implied term of mutual trust and confidence, entitling the club to summarily dismiss him
- The fact that he had not seen the policy was irrelevant, as it was clear to a person in Mr Williams' role that the conduct was unacceptable
- Mr Williams had risked causing offence to the junior female employee and had left the club vulnerable to a harassment claim. His conduct had also risked affecting the club's reputation
- To assess the seriousness of any breach, it was necessary to consider all the relevant circumstances including the nature, degree and consequence of the breach and also the nature of the business and the employee's position





'How many dirty white fucking men rape and abuse children throughout the world! U cant put this down to race or religion. For all you dickhead motherfuckers who are against Islam, go fuck ur fucking mums! Were not going nowhere you racist bastard!! We are here to stay! We run this country. U lazy arse people on benefits living in council houses! Go get jobs u scum!'

Anwar v LHR Airports Ltd ET/2700839/14.

Can I sack someone for making discriminatory comments on Facebook?



- Potentially fair
- Have published rules been breached?
- Important to get the procedure right
- As thorough an investigation into the breach as can reasonably be done
- Consider whether the post will be seen by colleagues or customers
- How clear is the association with your company?



Fair or unfair – inappropriate pictures on Instagram



The wife of an Assistant Head Teacher took a picture of him naked with an erection on her Blackberry phone. He asked her to delete the photo and she agreed immediately, but the picture appeared on Facebook 15 months later after the Blackberry had been taken into a shop for repair. The picture was circulated by students at the school and numerous derogatory comments were made under the picture on Facebook.

Amey v London Borough of Barking & Dagenham ET/3201825/12.

What action can I take against someone who has inappropriate photographs on Instagram?



- Report the post and ask for it to be removed
- Ask the employee to remove the post
- Disciplinary action
 - Damage to reputation
 - Risk of vicarious liability
- Be clear about the allegations



Fair or unfair – reporting discrimination to the press



'Having been a hostess, I can confirm you don't have to sign a non-disclosure contract unless there's something an employer wants to hide. 33 years this event has been happening. They knew. #Times Up #PresidentsClub #MeToo #newsnight.'

Gutfreund-Walmsley v Big Lottery Fund Ltd [2019] 1 WLUK 365.

Can an employee complain to the press about their treatment at work without raising a grievance first?



- Employees have rights not to be dismissed or treated detrimentally where they raise discrimination issues
- Disclosure should primarily be internally to the employer, a 'responsible' third party, or a 'prescribed person'
- However, wider disclosures, such as to the media (or to the police), will qualify for protection in very limited cases
- Fully investigate and consider the nature and reasonableness of the disclosure to the media
- Engage with the employee and consider whether disciplinary action is appropriate





- Update social media policy and promote it – template for annual support clients
 - Make it clear the employee can be personally liable in discrimination claims
 - Tell them conduct outside work can still be disciplined
- Ensure disciplinary policy refers to breach of social media policy as potential gross misconduct offence
- Revisit data privacy policy and privacy impact assessment





- Rules about accessing social media sites at work: when and for how long?
- Information about what monitoring may be undertaken by the employer and the uses to which the results may be put
- A reminder to employees that they must not disclose confidential information or trade secrets or make derogatory or discriminating comments about the company, their colleagues or their clients on social media, whether those comments are made at work or outside the workplace
- A reminder that employees should not misuse other employees' personal data in online media
- A requirement that employees insert a disclaimer into any blog stating that any views contained on the blog are those of the employee and are not representative of the employer's views

Andrew Dunning
adunning@watershedhr.com

Lindsey Murray
lmurray@watershedhr.com



Ryecroft Aviary Road Worsley Manchester M28 2WF United Kingdom

Telephone +44 161 703 5611 **Web** www.watershedhr.com